Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

CLIFF AND BERTHA GARDNER,

Petitioners,

vs.

D. WAIVE STAGER; LLEE CHAPMAN; FRANKIE SUE DEL PAPA; RODNEY HARRIS; MARSHAL SMITH; MONT E. LEWIS; DALE ROBERTSON, also all other persons known or unknown, claiming any right, title, estate, lien or interest in the real property described in this complaint adverse to plaintiffs' ownership, or any cloud upon plaintiffs' title thereto,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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29P

QUESTIONS PRESENTED

1. Whether livestock grazers own forage rights and water rights on the unappropriated public lands acquired by usage prior to reservation as a forest reserve under the doctrine of prior appropriation?

2. Whether livestock grazers own forage rights on the unappropriated public lands acquired by usage prior to reservation as a forest reserve based on the common law right of common of pasturage?

3. Whether the sovereign immunity of the United States of America bars the assertion of the claims presented in the foregoing questions?

4. Whether Federal District Court dismissal is the appropriate remedy when an assertion of state created property rights has been removed by the United States from state court?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case, except that the United States of America was deemed to be the real party in interest for the named federal agents.

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Petitioners, Cliff and Bertha Gardner, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 103 F.3d 886 (9th Cir. 1996) and is reproduced in the Appendix filed herewith at page 1a. The opinion of the district court in this case is reported at 892 F. Supp. 1301 (1995) and is reproduced in the Appendix at page 7a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on December 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Nevada Revised Statutes 533.495 provides:

> Whenever one or more persons shall have a subsisting right to water range livestock at a particular place and in sufficient number to utilize substantially all that portion of the public range readily available to livestock watering at that place, no appropriation of water from either the same or a different source shall subsequently be made by another for the purpose of watering range livestock in such numbers and in such proximity to the watering place first mentioned as to enable the proposed appropriator to deprive the owner or owners of the existing water right

> of the grazing use of such portion of the public range, or substantially to interfere with or impair the value of such grazing use and of such water right.

The Organic Act 30 Stat. 34-36 (June 4, 1897) provides:

> The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, be reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

Sec. 16, of the Taylor Grazing Acts provides:

> Nothing in this Act shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act, impaired or restricted, and all laws heretofore enacted by respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect . . .

STATEMENT OF THE CASE

Gardners are fourth generation ranchers operating in the Ruby Valley, Nevada. Gardners' forbearers took up lands and established cattle herds in Ruby Valley as early as 1864. Ninety percent (90%) of these cattle grazed on the unappropriated lands for much of the year. These pioneers grazed their livestock on the eastern slope of the Ruby Mountains and on the brush lands of the valley floor. Sheep man attempted to take all the feed on the eastern slopes of the Ruby Mountains containing the area comprising the Gardners' range. In 1906 the ranchers in Ruby Valley explored ways to exclude the sheep men. It was decided that they should petition the United States Government for advice on procedure to create a forest reserve. Six such ranchers, including Bill Gardner, signed the petition. Franklin W. Reed was sent from Washington D.C. to examine the Ruby Mountains for a forest reserve. In 1906 the President of the United States signed a bill creating the Ruby Mountain and Independence Forest Reserve.

Prior to the creation of the forest reserve the ranchers had allocated individual ranges adjacent to their respective ranches where their cattle were to graze. These mutually reinforcing understandings were honored by each of the ranches and became uniform customs and practices. Such allocations were bought and sold with the ranches and were a recognized appurtenance to each such ranch. Claims to such grazing rights were historically heard in open meetings where the numbers of cattle and boundaries of grazing areas were asserted, discussed, and settled by the community. This resulted in mutually reinforcing understandings, which in turn resulted in claims of entitlement to graze certain numbers of cattle in specifically designated areas. There developed a clear and well understood reputation for the existence and extent of those rights. There further developed expectations between and among the ranchers of Ruby

Valley that the existence and extent of these rights would be honored and respected by other ranchers. Such grazing rights were thus solidified into property rights that were reinforced by uniform custom and practice. These rights were actually taken as of right and were used and enjoyed continuously, at least since 1872. At no time did Gardners' predecessors in interest have or seek permission of the United States of America or the State of Nevada. After creation of the forest reserve, permits were issued which were reflective of, based on, and issued as a formal establishment of such grazing rights. Under Nevada law the exercise of such grazing rights gave rise to of vested water rights for the livestock grazing. In order to establish water rights a rancher was required to show beneficial use of the water for grazing livestock The water right cannot exist without the grazing right and the grazing right cannot exist without the water.

In 1991 a tremendous change occurred in the manner in which the United States Forest Service dealt with permittees. Permittees were told that their vested water rights, (pending adjudication), would not be recognized, and numerous new "terms and conditions" were imposed on permitted use and prior agreements were not honored.

Upon investigation, Gardners learned that 36 C.F.R. § 219.10 and 43 C.F.R. § 1610.4(4) and (3) require that planning processes be applied "subject to valid existing rights". Yet federal employees were choosing not to recognize permittee's rights, either in grazing or water as a valid existing right.

Gardners filed a quiet title action in state court to cause a declaration of their state common law created rights, only to have the case removed to, and dismissed by the district court. The district court grounded jurisdiction on 28 U.S.C. § 1346. The Gardners' water rights were referred to an ongoing state proceeding that has been pending some ten years, but the rights

are being denied now by federal agents. Gardners' grazing right was not adjudicated by the district court, but was dismissed, denying the Gardners their right to have this claim vindicated under Nevada law. Gardners intended to establish that the water and grazing rights cannot be adjudicated separately, that they cannot be maintained separately, and are valid existing rights which are unaffected by the creation of a forest reserve.

REASONS FOR GRANTING THE WRIT

A conflict exists because this Court has said laws of property, "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). No court has determined the question of whether water and grazing rights established under state law prior to the permanent holding of lands by the United States are valid existing rights.

Always in the past the question of grazing rights has been posed as a question of whether or not congress had granted grazing rights. Never has the Court answered the question in the context of whether grazing rights created under the common law of common pasturage where a prior existing right to which the federal permanent holding of lands was subjected. The federal government's claim to permanently hold the unappropriated public lands is pursuant to the Creative Act of 1891, the Taylor Grazing Act, the Federal Land Policy and Management Act, and those statutes providing for planning processes. Each of such acts exert governance power "subject to valid existing rights". Gardners seek remedy in that context, are grazing rights held on public lands "prior existing rights" as established under common law or the doctrine of prior appropriation.

In *United States v. New Mexico*, 438 U.S. 696 (1978) this court held:

> . . . any water rights arising from cattle grazing by permittees on the forest should be adjudicated to the permittee under the law of prior appropriation and not to the United States. . . . The United States contends that, since Congress clearly foresaw stock watering on national forest, reserved rights must be recognized for this purpose. The New Mexico Courts disagreed and held that any stock watering rights must be allocated under state law to individual stock waters. We agree.

An additional example of congressional recognition of state jurisdiction is the Act of May 23, 1908, 35 Stat. which states:

> . . . officials of the Forest Service designated by the Secretary of Agriculture shall, in all ways practicable, aid in the enforcement of laws of the States or Territories with regard to Stock, for the prevention and extinguishment of forest fires, and for the protection of fish and game. . . .

In addition, claimed jurisdiction under Article IV of the United States Constitution over 87% of the lands of Nevada raise serious Fourteenth Amendment, equal protection questions. Federal employees refuse to recognize Gardners' grazing and water rights and then remove such a claim to United States District Court when Gardners attempt to vindicate such rights in state court. The district court then dismisses the claims rather than remand them back to state court. This effectively deprives Gardners of their remedy at law.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

GLADE L. HALL
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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 26, 1996

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CLIFF GARDNER; BERTHA GARDNER,
Plaintiffs-Appellants,

v.

D. WAIVE STAGER; LLEE CHAPMAN; FRANKIE SUE DEL PAPA; RODNEY HARRIS, MARSHALL SMITH; MONT E. LEWIS; DALE ROBERTSON, also all other persons known or unknown, claiming any right, title, estate, lien, or interest in the real property described in this complaint adverse to plaintiffs' ownership, or any cloud upon plaintiffs' title thereto,
Defendants-Appellees.

No. 95-16471
D.C. No. CV-94-00846-ECR
OPINION

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., District Judge, Presiding

Submitted November 6, 1996*
San Francisco, California

Filed December 26, 1996

Before: Herbert Y. C. Choy, Thomas M. Reavley,** and Edward Leavy, Circuit Judges.

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*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

**Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

Appendix A

Opinion by Judge Choy

SUMMARY

Government Law/Immunity

The court of appeals affirmed a district court judgment. The court held that sovereign immunity precludes a quiet title action not brought under the Quiet Title Act (QTA) for grazing rights on national forest land.

Appellants Cliff and Bertha Gardner brought a quiet title action in Nevada state court, seeking the right to graze cattle and to certain water rights on land located in the Humboldt National Forest. The United States, which was not a named party, removed the case to federal court as a real party in interest.

The district court deemed the United States the defendant party, and dismissed the case. The court held that the Gardners' suit was barred due to the sovereign immunity of the United States.

[1] The QTA provides the exclusive means to challenge the United States's title to real property. As the Gardners did not bring suit under the QTA, its limited waiver of sovereign immunity was inapplicable.

[2] There is also a limited waiver of the sovereign immunity of the United States under certain circumstances where water rights are concerned. The exception is limited to when there is a comprehensive adjudication of all of the water rights of various users of a specific water system. The waiver does not authorize private suits to adjudicate water rights between particular claimants and the United States, such as that brought by the Gardners.

[3] Moreover, dismissal was appropriate because there was a comprehensive adjudication of the rights of water users in the area, that the United States was participating in, before a Nevada state tribunal.

COUNSEL

Glade L. Hall, Reno, Nevada, for the plaintiffs-appellants.

Albert M. Ferlo, Jr., United States Department of Justice, Environment and Natural Resources Division, Washington, D.C., for the defendants-appellees.

OPINION

CHOY, Circuit Judge:

Cliff and Bertha Gardner ("Gardners") appeal from the district court's Fed. R. Civ. P. 12 dismissal of their quiet title action for grazing rights on land located in the Humboldt National Forest. We affirm.

Factual and Procedural Background

Cliff and Bertha Gardner own a cattle ranch in the Ruby Valley, Elko County, Nevada. The ranch is near the Humboldt National Forest. The Gardners and their predecessors in interest have grazed livestock on the federal forest land for many years.

Gardners now seek to quiet title to the right to graze cattle and to certain water rights on the Dawley Creek Allotment, which is part of the Humboldt National Forest. Gardners filed this action in Nevada state court on October 24, 1994. The complaint names several federal officials, including the forest

supervisor for the Humboldt National Forest, and certain officials of the state of Nevada, but does not name the United States as a defendant. On December 1, 1994, the United States, as the real party in interest, filed a notice of removal with the Nevada state court, and the case was removed to the United States District Court for the District of Nevada.[1] Rodney Harris and D. Waive Stager, two of the named federal officials, each filed disclaimers of interest in the federal property on January 20, 1995. The United States filed a motion to dismiss on February 1, 1995. On June 30, 1995, the district court deemed the United States to be the sole defendant in the action, granted the United States' motion to dismiss, and dismissed the claims against the federal and non-federal officials.

Analysis

I. Standard of Review

This court reviews de novo a district court's order granting a motion to dismiss. *Erickson v. Desert Palace, Inc.*, 942 F.2d 694-95 (9th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992).

II. Grazing Rights

Gardners seek to quiet title to grazing rights on the Dawley Creek Allotment, which is part of the Humboldt National Forest and as such is property of the United States. Gardners, however, sued to quiet title under a Nevada state statute. The district court held that Gardners' suit was barred due to the sovereign immunity of the United States.[2]

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[1]Gardners do not challenge the removal of this case from state court to federal court.

[2]Gardners do not contest this decision of the district court, and therefore have waived any claim of error on this jurisdictional determination. Issues not raised on appeal are considered abandoned. *Dilley v. Gunn*, 64 F.3d 1365, 1367 (9th Cir. 1995).

Appendix A

In the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, Congress provided that the sovereign immunity of the United States may be waived in certain instances for the purpose of determining title to real property. Congressional waivers of the sovereign immunity of the United States "must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) (quotation and citation omitted).

[1] In order to effectively challenge the title of the United States to real property, claimants must sue under the QTA. In *Block v. North Dakota*, 461 U.S. 273, 286 (1983), the Supreme Court held that "Congress intended the QTA to provide the *exclusive* means by which adverse claimants could challenge the United States' title to real property." (emphasis added). As Gardners did not bring suit under the QTA, the limited waiver of sovereign immunity provided by the QTA is not applicable to this case, and the suit is barred.

III. Water Rights

The district court also held that Gardners' claim to water rights on the federal forest land was barred by the sovereign immunity of the United States, and also that dismissal was appropriate since comprehensive proceedings regarding the use of this water system were ongoing in a state forum. Gardners argue that the federal government cannot claim sovereign immunity in this instance, and that the district court should have remanded the claim to state court.

[2] The McCarran Amendment, 43 U.S.C. § 666, provides for a limited waiver of the sovereign immunity of the United States in certain circumstances where water rights are concerned. This waiver, however, is limited to comprehensive adjudications of all of the water rights of various users of a specific water system. *Dugan v. Rank*, 372 U.S. 609, 618 (1963); *Metropolitan Water Dist. of Southern Cal. v. United States*, 830 F.2d 139, 144 (9th Cir. 1987), *aff'd sub nom. Cali-*

fornia v. United States, 490 U.S. 920 (1989). The McCarran Amendment does not authorize private suits to adjudicate water rights between particular claimants and the United States. *Metropolitan Water Dist.*, 830 F.2d at 144. The waiver of sovereign immunity provided by the McCarran Amendment is therefore inapplicable to Gardners' private suit for water rights against the United States.

[3] Moreover, when there is a comprehensive litigation of the water rights of the users of a particular water system ongoing in a state tribunal, the federal court may dismiss a water rights suit brought by a private party. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 569-70 (1983). There is presently before the Nevada State Engineer a comprehensive adjudication of the rights of water users in Ruby Valley,[3] and the United States is participating in that proceeding. The district court's dismissal of the water rights suit was therefore appropriate.

Conclusion

We AFFIRM the decision of the district court.

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[3]The administrative proceeding is entitled "In re: Adjudication of the Waters of Ruby Valley, Elko and White Pine Counties, State of Nevada (Before the Nevada State Engineer)."

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA FILED JUNE 30, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CASE NUMBER: CV-N-94-846-ECR

CLIFF GARDNER & BERTHA GARDNER,

Plaintiffs,

V.

D. WAIVE STAGER, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

* * *

X **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered on all claims in favor of all defendants and against plaintiffs.

June 30, 1995
Date

s/ Lance S. Wilson
LANCE S. WILSON
Clerk

Appendix B

s/ R. Damron
R. Damron
(By) Deputy Clerk

APPENDIX C — MINUTES OF THE COURT
FILED JUNE 30, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

CV-N-94-846-ECR

Date: June 29, 1995

CLIFF GARDNER and BERTHA GARDNER,

Plaintiffs,

vs.

D. WAIVE STAGER, et al.,

Defendants.

MINUTES OF THE COURT

PRESENT: EDWARD C. REED, JR. U.S. District Judge

Deputy Clerk: ROSEMARY DAMROM

Reporter: NONE APPEARING

Counsel for Plaintiff(s) NONE APPEARING

Counsel for Defendant(s) NONE APPEARING

MINUTE ORDER IN CHAMBERS

The Gardners filed this suit in the state court in Elko, seeking

to "quiet title," under NRS 40.090(2), to "grazing rights" and "water rights" in the Humboldt National Forest. They did not name the United States or any of its agencies as defendants, instead naming certain local and state officials and federal officials. The land at issue lies within a national forest which was created in 1911. The essence of the Gardners' complaint is that the federal government, since 1989, has acted unreasonably in its management of the land. Therefore, they seek to get around federal control of the land by arguing that they and their predecessors have, since at least 1872, occupied and used the land for ranching purposes, that their predecessors thus acquired common law rights to use the land for grazing purposes and to some amount of water as a matter of prior appropriation, Doc. #8 at 7-8, and that these rights, having been acquired before the creation of the national forest, are not subject to federal regulation. The argument is completely unpersuasive.

1. *The proper defendants*

Two defendants — Smith, the former Elko County District Attorney, and Chapman, an Elko County Commissioner — have moved to dismiss the complaint, on the ground that they do not claim any sort of interest or right in the land and water that is the subject of the complaint. Doc. #6 Exh. A. The Gardners accede to the motion, Doc. #11 at 6, and the complaint will be dismissed as to Smith and Chapman.

The United States, which is not a named party, removed this action to federal court and filed a motion to dismiss. Doc. #12. At least two federal officials are nominal defendants, but "suits in which governmental property rights are challenged in reality are against the United States and are barred by sovereign immunity" unless there is a statutory waiver of that immunity.

14 Charles A. Wright, *et al., Federal Practice & Procedure* § 3655, at 222 (2d ed. 1985); *see also Manwell v. Public Housing Admin.*, 165 F. Supp. 439 (N.D. Cal. 1958) (no claim stated against Public Housing Administration where plaintiff's quiet title suit would divest the government of an interest in real property).

The land in question here lies within a national forest. A suit by the Gardners to "quiet title" to grazing and water rights in a national forest is a suit against the United States directly, and the United States is the proper defendant. The Gardners cannot get around this fact by naming federal officials as individual defendants. Indeed, the United States, as noted above, has entered an appearance, recognizing that its own interests in land and water are at stake. We will therefore dismiss the individual federal defendants. Similarly, because the other individual defendants (apparently state officials) can have no right or claim in federal land or water, we will dismiss the suit as to them, too. We deem the United States to be sole defendant in this action, and proceed on that basis.

2. *Grazing rights*

This is not the first time that ranchers in Elko, unhappy with federal land management policies, have sued the government. *See Brooks v. Dewar,* 313 U.S. 354 (1940). The Gardners' claim to grazing rights suffers from two defects.

First, the Gardners sued under a Nevada statute, as to which the United States has sovereign immunity. Supreme Court and Ninth Circuit precedent establish, in the clearest terms possible, that the federal Quite Title Act, 28 U.S.C. § 2809a, provides the *only* means by which an adverse claimant can challenge the

United States' title to real property. *Block v. North Dakota ex rel. Board of Univ. & Sch. Lands*, 461 U.S. 273, 285 (1983); *South Delta Water Agency v. Department of the Interior*, 767 F.2d 531, 541 (9th Cir. 1985).

Second, even if they had sued under § 2409a, and thus avoided the sovereign immunity bar, the Gardners would lose on the merits, for their claim flies in the face of a century of Supreme Court precedent. Generally,

> [i]n the pioneer or "emigrant" days of western America immense areas of unappropriated and otherwise unused territory were freely used by stockmen for grazing. The government not only refrained from objecting to this practice but in various ways encouraged it and in time this privilege . . . became "an implied license, growing out of the custom of nearly a hundred years." This license was held to be the basis of various rights as between the licensee and other private individuals *but not as between the licensee and the government*. . . . "And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the government did not cancel its tacit consent. . . . *Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United*

Appendix C

> *States of the power of recalling any implied license under which the land had been used for private purposes.*"

Osborne v. United States, 145 F.2d 892, 894 (9th Cir. 1944) (citations omitted) (emphasis added) (*citing Buford v. Houtz,* 133 U.S. 320 (1890); *Light v. United States,* 220 U.S. 523 (1911); *Omaecheverria v. Idaho,* 246 U.S. 343 (1918)).

The Nevada Supreme Court, too, has referred to grazing on public lands as something done under an "implied license" or at the "sufferance" of the federal government noting that it

> is not a right that the government of the United States has conferred, and these public ranges may at any time be withdrawn from such use or the use permitted only under government regulations, as in the case of forest reserves.

Itcaina v. Marble, 55 P.2d at 625 (Nev. 1936). Finally, the Gardners cannot argue, at least not successfully, that their predecessors acquired vested water rights and that grazing rights are "appurtenant" to such water rights. That argument was expressly rejected long ago. *See Hunter v. United States,* 388 F.2d 148, 153-55 (9th Cir. 1967). The argument once had some support under a 1925 Nevada stockwatering statute, *see* NRS 533.495, but the Nevada Supreme Court long ago ruled that this feature of state law is preempted by the federal Taylor Grazing Act, which vested "complete administration and control of the range" in the Bureau of Land Management. *Ansolabehere v. Laborde,* 310 P.2d 842 (Nev. 1957).

Thus, the fact that their predecessors grazed stock on the land at issue in the 1870's does not mean that the Gardners today have a vested grazing right (a right of "pasturage") immune from federal regulation. On the contrary: use of public lands for stock grazing, either under the original regime of "tacit consent" or under the permit system after establishment of the national forests, was and is a privilege with respect to the federal government, revocable at any time. The Gardners' use of federal land is subject to regulation by the federal government. If they believe the federal government is acting unfairly or unwisely, the appropriate course of action is to take the complaint to their elected representatives in Congress.

3. *Water rights*

The Gardners' argument that they have "valid, vested and existing water rights," because they and their predecessors have used the water for the beneficial use of watering livestock, is also defective. It is true that watering livestock is a beneficial use under Nevada law. NRS 533.490. It is also true that if the Gardners' predecessors acquired vested rights to some quantity of water by virtue of that use, before the land in question was withdrawn from the public domain, then those rights may well be valid even as against federal reserved rights. *See Cappaert v. United States,* 426 U.S. 128, 138 (1976) ("when the federal government withdraws land from the public domain and reserves it for a federal purpose, ... the United States acquires a reserved right in *unappropriated* water which vests on the date of the reservation . . ."); *Hunter,* 388 F.2d at 151-53 (appellant had a water right where predecessors had appropriated water for livestock in the public domain, consistent with local practice, before the land in question was designated a national monument); 43 U.S.C. § 661 (water rights vested under local law are protected).

The problem with the Gardners' water rights argument is that the United States has sovereign immunity from suit, which is waived only by the McCarran Amendment. 43 U.S.C. § 666. That statute subjects the United States to the jurisdiction of the state courts when the state courts adjudicate water rights in an entire river system, but it has another consequence, as well: where, as in this case, there is an ongoing, comprehensive adjudication of water rights in an entire river system in the state courts, and where the United States, as in this case, is participating in that adjudication, a water rights suit brought by a private party in a federal district court may be dismissed. *Arizona v. San Carlos Apache Tribe,* 463 U.S. 545, 565-66 (1983). Dismissal is appropriate here: the state statutes provide a detailed and comprehensive scheme for adjudicating the rights of all claimants to a particular water system, and the State Engineer is currently conducting such an adjudication. The Gardners cannot "opt out" and bring their own claim to federal court.

We would add that the plaintiffs' pleadings in this case, for which we hold plaintiffs' counsel responsible, border on the frivolous and sanctionable under Rule 11. They reflect a lack of research into the most basic legal concepts and principles applicable to this case, and, as noted, are directly contradicted by an unbroken line of Supreme Court precedent.

IT IS THEREFORE HEREBY ORDERED that Smith and Chapman's **motion (Doc. #6 Exh. A)** to dismiss is **GRANTED.**

IT IS FURTHER ORDERED that **all other named defendants** are also **dismissed.**

Appendix C

IT IS FURTHER ORDERED that the United States' **motion (Doc. #12)** to dismiss, construed as a motion to dismiss on the merits by the sole remaining defendant, is **GRANTED.**

IT IS FURTHER ORDERED that the **clerk** shall enter **judgment** on all claims in favor of all defendants and against plaintiffs.

LANCE S. WILSON, CLERK

By s/ Rosemary Damron
Deputy Clerk